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6 **UNITED STATES DISTRICT COURT**
7 **WESTERN DISTRICT OF WASHINGTON**
8 **AT SEATTLE**

8 DAVID MUNGAI NJENGA,)

9 Petitioner,)

Case No. C11-847-JLR-BAT

10 v.)

**REPORT AND
RECOMMENDATION**

11 NATHALIE ASHER, Seattle Field Office)
12 Director, United States Immigration and)
Customs Enforcement,)

13 Respondent.)

14 On February 15, 2011, petitioner, proceeding *pro se* and *in forma pauperis*, filed his sixth
15 Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, which challenged the
16 lawfulness of his continued detention under 8 U.S.C. § 1231(a)(6) pending a stay while the
17 United States Court of Appeals for the Ninth Circuit decides his appeal of the denial of his
18 motion to reopen. *Njenga v. Asher*, No. C11-265-JLR-BAT (Dkt. No. 6). On April 22, 2011, the
19 Court granted the government's motion to stay briefing case until 45 days after the issuance of
20 the mandate in *Diouf v. Napolitano*, __ F.3d __, 2011 WL 768077 (9th Cir. March 7, 2011),
21 finding the case potentially dispositive of the habeas corpus action. *Id.* at Dkt. No. 18. On May
22 3, 2011, petitioner filed a motion for voluntary dismissal of his habeas petition, which the Court
23 subsequently granted. Dkt. Nos. 22 and 25.

1 On May 19, 2011, petitioner filed his seventh and instant Petition for Writ of Habeas
2 Corpus, challenging the lawfulness of his continued detention pending a stay while the Ninth
3 Circuit decides his appeal of the denial of his motion to reopen. Dkt. No. 6. The Court
4 subsequently directed respondent to file a return and status report (“RSR”) to the habeas petition.
5 Dkt. No. 7.

6 On June 23, 2011, respondent filed a motion for stay of briefing pending issuance of the
7 mandate in *Diouf*. Dkt. No. 12. In *Diouf*, the Ninth Circuit recently held that aliens who are
8 detained beyond six months under 8 U.S.C. § 1231(a)(6) and who received a stay while pursuing
9 a petition for review of the denial of a motion to reopen by the Board of Immigration Appeals
10 (“BIA”), are entitled to a bond hearing before an immigration judge at which the government
11 bears the burden of showing that the alien poses a flight risk or a danger to the community.
12 *Diouf*, ___ F.3d ___, 2011 WL 768077. In reaching this conclusion, the Ninth Circuit held that the
13 180 day post-order custody review process afforded by the immigration regulations was
14 insufficient to “address the serious constitutional concerns raised by continued detention.” *Id.* at
15 9. The government has filed a petition for rehearing en banc of that decision with the Ninth
16 Circuit Court of Appeals, which remains pending.

17 Respondent asserts that *Diouf* directly affects the outcome of petitioner’s current habeas
18 petition, and requests that the Court grant a stay of the briefing schedule and continue the filing
19 date of the RSR until 45 days after issuance of the mandate. Dkt. 12 at 2. She contends that “[i]f
20 the parties are required to proceed with briefing at this time, there is a strong likelihood that
21 further briefing will be sought once the mandate in *Diouf* is issued.” *Id.* at 3.

22 Because *Diouf* is potentially dispositive of this case and because any delay will be
23 limited, the Court recommends that respondent’s motion for stay of briefing pending issuance of

1 the mandate in *Diouf* be granted. A proposed order accompanies this Report and
2 Recommendation.

3 DATED this 28th day of June, 2011.

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7 BRIAN A. TSUCHIDA
8 United States Magistrate Judge
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